facie tort idea.[10] While this view may be salutary, the historical growth of this branch of the law has certainly established the doctrine. It is, moreover, a theory that has been given particular attention and approval in the English cases.[11] Even if we reject the prima facie tort idea, however, the court has failed to furnish a satisfactory reason for holding that a secondary boycott is a legal method.

Upon examination of the English cases, it seems that, unless the facts of the instant case fall within the Trades Dispute Act[12] (which the court fails to mention), the means used should have been considered unjustifiable.[13] The present decision would be anomalous in America, as it presents the case of a secondary boycott, which is permitted in only a few states.

If a secondary boycott is to be permitted, it is far better that it be openly recognized as such, than that its true character be veiled by circuitous reasoning. Its legality may be coming in America. If so, it is to be hoped that the courts will be frank enough to admit that the past decisions were unjust, and that public policy has required the change.

THE OFFER OF PROOF IN GROUNDING EXCEPTIONS

Many attorneys apparently assume that omniscience is inherent in appellate courts. In appealing a case they present a record of the trial court which is fundamentally deficient in failing to place the errors assigned fairly before the court of appeals. This is due either to the

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Medical Assoc., supra note 8, at p. 258 *et seq.*, as supporting the opposite view, advanced in COMMENTS (1921) 30 YALE LAW JOURNAL, 230.

[10] "Such co-existing rights do in a world of competition necessarily impinge upon one another, and it appears to me illogical to start with the assumption that an interruption of the power of a man to do as he pleases within the law is *prima facie* a legal wrong, which in every case needs to be justified. The true question is, was the power interrupted by an act which the law deems wrongful? with the practical result that to determine liability one has to concentrate, not upon the effect on the plaintiff, but upon the quality of the act of the defendant." Atkin, L. J., at p. 276.

[11] The instant case is the first case of importance to uphold this doctrine since it was brought into prominence in the case of *Allen v. Flood, supra* note 1. On the other side, there is a line of important cases upholding the prima facie tort idea. This started with the case of *Mogul Steamship Co. v. McGregor* (1889, C. A.) L. R. 23 Q. B. Div. 598, and was approved by *Quinn v. Leathem, supra* note 2, at pp. 525, 527. *Giblan v. Nat'l Amalgamated Union* [1903] 2 K. B. 600, 625; *Attorney-General v. Adelaide Co.* (1913, P. C.) 109 L. T. R. 258.

[12] (1906) 6 Edw. VII, c. 47.

[13] It is difficult to reconcile the instant case with that of *Larkin v. Long* [1915, H. L.] A. C. 814, where the plaintiff was given a remedy under circumstances not as strong as those of the instant case. Where the Trades Dispute Act, *supra* note 12, does not apply (i. e. acts done not in contemplation of furtherance of a trade dispute within the meaning of the act) it seems that the common-law rules should govern and in the instant case the means would be illegal.

tardy diligence of an earnest search through the record for flaws after the trial is over or else to a careless omission of an offer of proof as the basis of error when they know that the lower court's refusal to hear their witness is erroneous. The offer of proof, necessary to perfect a record, varies in procedure and inclusiveness in different jurisdictions. The majority of courts, however, require the more formal procedure.[1] Under their practice it is necessary actually to call a witness to the stand and a mere conversation between the court and counsel is not a sufficient offer of evidence.[2] This rule assures a strict guaranty of good faith and fairness by the proponent of the evidence. The Federal Courts on the other hand assume good faith and require the presentation of a witness only where there are indications of bad faith.[3] The advantages of thus dispensing with the use of a witness are said to be the saving of time and the placing of the issues of law more decisively before the court.[4] It carries with it, however, a possibility of the court being deceived by unscrupulous counsel who may in fact be unable to produce the proof offered.

To constitute prejudicial error in excluding the answer of a witness on the stand, the question must be both proper in form and pertinent to the matter at issue. An appellate court will not grant a new trial for an erroneous ruling based on one of these grounds, if the evidence would be inadmissible on the other.

Where an objection to a proper question has been sustained, to save an error in the record, counsel must of course take an exception. The rules followed in the various jurisdictions differ as to whether or not it is incumbent on him to proceed further. According to the orthodox view no error will be predicated unless the proponent of the evidence follows his exception with a statement of the answer he expected.[5]

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[1] *Chicago City Ry. v. Carroll* (1903) 206 Ill. 318, 68 N. E. 1087; *Juby v. Craddock* (1919) 56 Mont. 556, 185 Pac. 771; 1 Thompson *Trials* (2d ed. 1912) sec. 685.

Where a proper offer of proof is made with one witness, the proponent need not call others to lay the basis for his exception to the exclusion of further evidence necessary for his case. *Bartholow v. Davies* (1916) 276 Ill. 505, 114 N. E. 1017.

[2] Cf. *Chicago City Ry. v. Carroll, supra* note 1.

[3] *Scotland County v. Hill* (1884) 112 U. S. 183, 5 Sup. Ct. 93; *Mo. Pac. Ry. v. Castle* (1909, C. C. A. 8th) 172 Fed. 841; *Platte Valley Cattle Co. v. Bosserman-Gates, etc. Co.* (1912 C. C. A. 8th) 202 Fed. 692. Wisconsin does not require the calling of a witness. *Witt v. Voigt* (1916) 162 Wis. 568, 156 N. W. 954.

[4] Cf. *Scotland County v. Hill* and *Platte Valley Co. v. Bosserman-Gates, etc. Co., supra* note 3.

[5] *McKee v. Hurst & Co.* (1918) 21 Ga. App. 571, 94 S. E. 886; *Arfsturm v. Baker* (1919, Mo.) 214 S. W. 859; *Pittsburg etc. Ry. v. Retz* (1919, Ind. App.) 125 N. E. 424; *Louisville, etc. Ry. v. Abercrombie* (1919) 17 Ala. App. 233, 84 So. 423; *Stilz v. Ketelsen* (1920, Ind. App.) 129 N. E. 31; *Seals, etc. Co. v. Bell* (1920) 17 Ala. App. 331, 84 So. 779; *Bringhurst v. Bringhurst* (1920, Mo. App.)

This then becomes part of the record. An appellate court may thus judge whether or not the appellant has been prejudiced by the exclusion of the evidence.[6] If testimony has been wrongfully excluded as incompetent, the granting of a new trial would indeed be vain if the evidence proved irrelevant or immaterial.[7] The orthodox rule safeguards an appellee from the intentional protraction of litigation by an appellant seeking to defeat the ends of justice. The federal rule, on the contrary, requires no such offer of the expected evidence. A party is deemed to have been harmed by an adverse ruling where his question was proper in form and relevant to the issue and would have admitted of an answer favorable to him.[8] A dispensation with a demonstration of purpose by counsel is alleged to have two advantages. It does away with repeated offers of proof as the trial progresses; it guards against the possibility that the statements to the court will furnish the witness a key to a realization of the exact testimony needed.[9] If one more formality, added to those incident to receiving evidence, is an inconvenience, it is certainly not as great as the difficulties inherent in the weary route of a new trial reaching the same end unaffected by the evidence that had previously been excluded. The second argument in support of the federal rule asserts the danger that the witness will be prompted. This is more apparent than real. No injustice has been done if the testimony is true. If a falsehood, the opposing party has his opportunities of cross-examination and impeachment. But all objections could be obviated by requiring the incorporation in the record of the answer of the witness. To prevent the possible prejudice of the jury, the jurors could retire as when a witness is examined on his *voir dire*.[10]

Certain circumstances, however, render an offer of proof unnecessary. Where a trial court regards the theory of the proponent as futile, the court's ruling strikes at the heart of his case and he need make no offer of proof.[11] This is a situation where the court and not counsel is at fault. In the recent case of *Gutt v. Walter's Estate* (1921,

222 S. W. 874; *Janson v. Pac. Diking Co.* (1920) 97 Or. 129, 190 Pac. 340; *Davis v. Union Meeting House Soc.* (1920) 93 Vt. 520, 108 Atl. 704; *Reeves v. Redmond* (1921, Vt.) 113 Atl. 711, 3 C. J. 825.

[6] *Ashmun v. Nichols* (1919) 92 Or. 223, 180 Pac. 510.

[7] Cf. *Powell v. Union Pac. Ry.* (1914) 255 Mo. 420, 446, 164 S. W. 628, 636.

[8] *Buckstaff v. Russell* (1894) 151 U. S. 626, 14 Sup. Ct. 448; *Himrod v. Ft. Pitt Mining Co.* (1912, C. C. A. 8th) 202 Fed. 724. Where the exclusion of a deposition is assigned as error, the federal courts require in the record a demonstration of what the testimony would be. *Packet Co. v. Clough* (1874, U. S.) 20 Wall. 528. This is due to a rule of court. *Rules of the Supreme Court* (1884) no. 21, sec. 2 (2).

[9] Cf. *Buckstaff v. Russell, supra* note 8.

[10] Cf. *Cincinnati, etc. Ry. v. Stonecipher* (1895) 95 Tenn. 311, 32 S. W. 208; *Griffin v. Henderson* (1903) 117 Ga. 382, 43 S. E. 712.

[11] *Brundage v. Mellon* (1895) 5 N. D. 72, 63 N. W. 209.

Mich.) 184 N. W. 529, a trial judge was similarly to blame for the indefinite condition of the record, as he had prevented counsel from making a formal offer. Quite properly a new trial was granted. While the appellate court may penalize a party for his counsel's carelessness, it should give him the benefit of any doubt that is the result of the trial court's confidence in its own infallibility.

The more common exception where an attorney need not proceed with an explanation of his purpose is one taken when his question on cross-examination is held improper.[12] This is obviously correct. An offer of the expected answer would be merely speculative. It would allow unscrupulous attorneys to deal unfairly with the court. It would put the witness on his guard destroying the whole purpose of cross-examination.

Most of the work of appellate tribunals should be done by counsel and judge in the trial court.

When is a "legal highway" not a highway? When there is not a clear and unobstructed path to the heavens. That, in effect, seems to be the doctrine laid down in *Town of Exeter v. Meras* (1921, N. H.) 114 Atl. 24. The Town of Exeter claimed a right in a highway by user for more than the twenty-year period prescribed by statute.[1] During this period, a bay window projected from the second story of the defendant's house above the claimed highway. The defendant was the original owner of the land in question. He commenced to extend the bay window down to the ground, and the Town of Exeter petitioned for an injunction to restrain him, as such an extension would incumber the highway. The bill was dismissed on the ground that a "legal highway" included not only the soil, but also all the space above it, and the partial occupancy of this space by a bay window during the prescriptive period constituted a continuous assertion of a right inconsistent with that of the public in the highway. Reduced to its simplest terms, this amounts to saying that in no case can a "legal highway" come into existence where there has been some occupation of a portion of the space above, however slight.[2] An extraordinary proposition! Can

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[12] *Knapp v. Wing* (1900) 72 Vt. 334, 47 Atl. 1075; *Cunningham v. Austin, etc. Ry.* (1895) 88 Tex. 534, 31 S. W. 629; *Budd v. Northern Pac. Ry.* (1921) 59 Mont. 238, 195 Pac. 1109; but see *contra, Reynolds & Heitsman v. Henry* (1921, Iowa) 185 N. W. 67.

[1] N. H. Pub. Sts. 1901, ch. 67, sec. 1.

[2] The Court, however, suggests a distinction between a "legal highway" and a right of travel differing from and less than a "legal highway." Such a distinction does not seem to be borne out by the authorities. It is quite probable that the Court, in making this distinction, is influenced in great measure by the fact that New Hampshire is one of the few states in which a right of way by immemorial user or custom may be acquired. *Knowles v. Dow* (1851) 22 N. H. 387.

one, by maintaining a flag-pole, for example, over a claimed highway by prescription, later defeat the right of the public to use such a highway by extending the pole in a solid mass to the ground? Many public highways run underneath covered arches or connecting bridges such as join factory buildings on opposite sides of the street. To permit such highways to be effectually destroyed by allowing an owner to so extend an arch or bridge to the ground with impunity would clearly hamper and endanger public travel. Though the Court in the instant case deals with the problem as one involving a prescriptive right acquired by user, as was justified by a statute,[3] it appears to be but a simple case of a dedication to the public. The question raised really involves the limit or extent of a highway dedicated to the public. From the nature of the case, to define the boundaries of a highway so dedicated is quite impossible. The authorities are agreed, however, that the extent of a dedication is, as a general rule, co-extensive with the actual use by the public.[4] If, therefore, in the principal case, such use extended as a matter of fact to the portion of the highway under the bay window, it would seem that such a right was acquired by the public for purposes of public travel as could not be interfered with by the defendant. To recognize such a right in the public would not at all be recognizing a further right to have the window removed as originally maintained, a proposition plainly implied by the court. Such a conclusion is clearly a *non-sequitur* if we apply the general rule, for the public use did not extend to the space occupied by the window.

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[3] *Supra* note 1.

[4] *Donovan v. Union Pac. Ry.* (1920) 104 Neb. 364, 177 N. W. 159; *Thiessen v. City of Lewiston* (1914) 26 Idaho, 505, 144 Pac. 548; Angell, *Highways* (3d ed. 1886) sec. 155. Where, however, there has been an express dedication defining the boundaries of the highway, the fact that the public confined its use to a narrow portion does not affect its right to use the entire width. *Brunner Fire Co. v. Payne* (1909) 54 Tex. Civ. App. 501, 118 S. W. 602.